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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-792, 72-802

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, *et al.*,

Appellants,

and

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, *et al.*,

Intervenors-Appellants,

—against—

DOLORES DUBLINO, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

RIEF *AMICI CURIAE* OF THE NATIONAL WELFARE RIGHTS ORGANIZATION, CITYWIDE COORDINATING COMMITTEE OF WELFARE ORGANIZATIONS AND THE UPSTATE WELFARE RIGHTS ORGANIZATION

Interest of *Amici Curiae*

Amici file this brief pursuant to Rule 42(2) of the Rules the Supreme Court. Written consent of the parties been filed with the Clerk of the Court.

Amici are membership organizations composed of recipients of public assistance across the country and in New York State. National Welfare Rights Organization (NWRO) is a national voluntary association of welfare recipients. It was formed in 1967 by recipients of public assistance to enable them to learn of their rights and entitlements and to organize and teach individuals in need of financial assistance how to secure public assistance benefits. The membership of NWRO includes more than 125,000 members in 50 states. Since many of its members have been, and continue to be, adversely affected by regulations which deny welfare benefits to families in violation of the requirements of the Social Security Act, the Organization has devoted much of its energies and resources to the abolition of such arbitrary rules. Members of NWRO have appeared as individual plaintiffs before this Court on many occasions; the Organization also submitted briefs *amicus curiae* in *Lewis* v. *Martin*, 397 U.S. 552 (1970), and *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

City Wide Coordinating Committee of Welfare Organizations (Citywide) was formed in 1966 by welfare recipients for the purpose of assisting all needy individuals to receive the grants to which they are legally entitled. Citywide is the coordinating agency for neighborhood welfare organizations in New York City and it has over 10,000 members who are also members of NWRO. Upstate Welfare Rights Organization (Upstate) is an amalgam of local groups spread over New York State from Westchester County north to the Canadian border and west to Lake Erie. It was established in 1968 and includes 66 local groups covering 75% of the geographical area of the state. Through this organization, local groups coordinate their activities and

share information as to the policies and practices of the welfare agencies and the rights of applicants and recipients. Members of Upstate are also members of NWRO.

Amici, and Upstate and Citywide in particular, have specific knowledge of the operation of the New York Work Rules through the experiences of their members who have been required to participate in the program. This experience, together with their intimate knowledge of the welfare program in the state, leads them to challenge the frequent assertions that the program was designed for a benevolent purpose, and that the framers or administrators of the program either intended or believe that it will aid families on assistance to achieve independence through the attainment of sustained paid employment which will remove their need for further assistance. Accordingly, *amici* wish to inform this Court, as they did the Court below, as to why they believe the work rules are illegal. Although two separate questions have been raised on this appeal, *amici* will address themselves in this brief only to one of them.

The first question is whether New York's work rules, and in particular N. Y. Soc. Serv. L. §131.4, contravene the federal requirement in §402(a)(10) of the Social Security Act, 42 U.S.C. §602(a)(10), that AFDC be furnished to all eligible individuals insofar as they operate to exclude from the AFDC program those individuals who refuse to comply with such rules. If so, they are invalid under the Supremacy Clause as long as New York continues to participate in the AFDC program. The second question is whether New York's work rules must fall under the Supremacy Clause because they attempt to cover an area of regulation, work requirements for AFDC recipients, which has been pre-

empted by federal legislation, namely the comprehensive Work Incentive Program established in Part C of Title IV of the Social Security Act, 42 U.S.C. §630 *et seq.*, and which is administered by the U.S. Department of Labor. Appellees are entitled to prevail if either question is answered in the affirmative. While we fully endorse appellees' position as to the preemption issue, and believe the Court would be entirely justified in affirming the decision below on that ground, we have decided to address ourselves only to the issue raised under §402(a)(10) because of two considerations.

First, §402(a)(10) is the most fundamental requirement of the AFDC program, and expresses a basic premise in the congressional grant-in-aid structure, namely that "available funds should be used for the benefit of all persons who meet the conditions of eligibility. . . ." H. Rep. No. 1300, 81st Cong., 1st Sess. (1949), p. 43. However, despite its critical role in the AFDC program, this provision has *never* been properly interpreted by the Department of Health, Education and Welfare in its administration of the billions of dollars of federal funds expended under the program. Instead, HEW has permitted the states to exclude persons from the AFDC program who meet federal eligibility standards. This Court has interpreted §402(a)(10) to prohibit such exclusions from AFDC coverage with a written opinion on three separate occasions, *King* v. *Smith*, 392 U.S. 309 (1968); *Townsend* v. *Swank*, 404 U.S. 282 (1971); and *Carleson* v. *Remillard*, 406 U.S. 598 (1972), and in the latter two cases decided in the 1971 Term the Court *expressly* rejected HEW's construction of the statute. Nonetheless, HEW has not taken any steps to revise its official interpretation expressed in published regulations, and it is safe

to say that, as a consequence, every state participating in AFDC is in violation of §402(a)(10) as construed by this Court. See *National Welfare Rights Organization* v. *U.S. Department of Health, Education and Welfare,* No. 264-73, filed February 13, 1973, D.D.C. Simply stated, we hope that a fourth written opinion based on §402(a)(10) might have a therapeutic effect on the federal agency.

A second reason for devoting our brief to a discussion of the effect of §402(a)(10) on the New York work rules is the rather unbelievable failure of either the State or County Appellants to discuss the issue in their Briefs. The state refers to §402(a)(10) with but a single citation (Br. 2) and then characterizes that section as being one of "the Federal statutes relating to the Work Incentive Program" which, of course, it is not. The State's brief does not even cite, much less discuss, *Carleson, Townsend* or *King*. The County appellants, on the other hand, do not cite §402(a)(10) in their brief, although they do make a single reference to "*Townsend* v. *Swank* . . . and similar cases" (Br. 16). Whether or not the appellants fail to discuss §402(a)(10) by accident or design, it is obvious that as a result, the nature of the case before the Court has been distorted by their presentations.

Summary of Argument

Section 402(a)(10) of the Social Security Act requires each state's AFDC plan to provide that AFDC "shall be furnished with reasonable promptness to all eligible individuals." In the 1971 Term of this Court, this requirement was twice interpreted to mean that

> "at least in the absence of Congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971).

See also *Carleson* v. *Remillard*, 406 U.S. 598, 600 (1972); *King* v. *Smith*, 392 U.S. 309 (1968). The New York work rules violate this requirement.

Under N.Y. Soc. Serv. L. §131.4, individuals determined to be "employable" are required to make a diligent search for day care, report bimonthly to the State Employment Service, and accept all job referrals and job offers in order to continue eligible for AFDC. These requirements are not imposed by the Social Security Act, and thus the New York rules exclude from AFDC many individuals who qualify for AFDC under *federal* standards. The only provisions in the Social Security Act requiring AFDC recipients to accept jobs, and otherwise participate in work-referral programs, are those in the Work Incentive Program (WIN) administered by the U.S. Department of Labor. See 42 U.S.C. §§602(a)(19), 630 *et seq.* New York's program excludes from AFDC individuals who have met, and agree to meet, all requirements imposed upon them pursuant to the WIN program.

Nothing on the face of the Social Security Act or its legislative history evidences an intention by Congress to authorize the states to deny AFDC to persons otherwise eligible under federal standards because of their failure to comply with compulsory work requirements administered

by a state welfare agency. Indeed, the Act and its history specifically evidence an intention to prohibit work-related eligibility requirements except insofar as they are administered under WIN. Thus, the original purpose of enacting the AFDC program in 1935 was "to meet a need unmet by programs providing employment for breadwinners." *King* v. *Smith, supra,* 392 U.S. at 328 (1968). The AFDC program, which provides financial aid to needy families with a dead, absent or incapacitated parent, was deemed necessary to release the remaining parent from the wage-earning role so that that parent could remain home and care for the child. This original congressional purpose was reaffirmed in 1949 when Congress, recognizing that it was "necessary for the mother or another adult to be in the home full time to provide proper care and supervision," H. Rep. No. 1300, 81st Cong., 1st Sess. (1949), at 46, added the caretaker relatives in AFDC families (e.g. the mother) as eligible individuals in their own right, 42 U.S.C. §606(b)(1), so that such relatives would receive financial assistance for their own basic needs and thus could better care for their children.

Initial congressional authorization for compulsory work requirements in AFDC occurred in the early 1960's when Congress added the children of unemployed parents to the AFDC program in 1961, 42 U.S.C. §607 (AFDC-U), and enacted community work and training programs which were largely for the unemployed fathers in that program, 42 U.S.C. §609. The AFDC-U fathers were placed under an obligation to accept job referrals in order to remain eligible since in those families the mother would be able to remain home to care for her child, and in other AFDC families Congress required the provision of day care before single

parents, usually mothers, could be compelled to participate in community work and training programs. In 1967, however, Congress repealed the authority for state-administered community work and training programs, repealed the requirement that AFDC-U fathers, as a condition of eligibility, accept any bona fide job offers made by the state, and replaced those provisions with the comprehensive WIN program administered by the U.S. Department of Labor. Committee reports reveal that Congress specifically intended to place all authority and responsibility for the administration of compulsory work requirements in the AFDC program with the federal manpower agency, and thus it rejected the original House proposal which would have mandated each state welfare agency to administer such work requirements.

The WIN program provided for testing, counseling and placement by the Labor Department, and included detailed provisions protecting recipients from harmful and inappropriate job referrals. In 1971 Congress expanded the WIN program and its emphasis on its approach in the 1967 amendments to rely only on the Department of Labor to administer the AFDC work program. Pub. L. 92-223, §3. The effect of the 1967 and 1971 WIN legislation was to establish clear congressional intent that the departure from the original purpose of AFDC, i.e. to permit the mother to remain home to care for her children, was to be countenanced *only* where the carefully delineated requirements of the WIN program were satisfied. That intent is inconsistent with the notion that Congress intended to authorize state non-WIN work eligibility requirements, which were considerably less protective of recipients' rights and were not administered by the federal manpower experts.

ARGUMENT

The New York work rules violate Section 402(a)(10) since they exclude from the AFDC program individuals who meet all federal requirements for the receipt of AFDC.

Section 402(a)(10) of the Social Security Act, 42 U.S.C. §602(a)(10), requires each state's AFDC plan to provide that AFDC "shall be furnished with reasonable promptness to all eligible individuals." Until the 1971 Term of this Court there had been considerable dispute over the scope of the term "eligible individuals" as used in §402(a)(10). This Court, in its first welfare case as long ago as 1968, had read the provision to prohibit the exclusion from AFDC of any child who qualified as a "dependent child" under §406, 42 U.S.C. §606. *King* v. *Smith, supra,* 392 U.S. at 333. Many lower federal courts thereafter interpreted *King* as requiring state AFDC programs to include all families who met the test of "need" and "dependency" established by the federal statute.[1]

The Department of Health, Education and Welfare, however, did not similarly construe *King* v. *Smith,* and it maintained its long-held view that the Social Security Act permits the states to define AFDC eligibility criteria in terms narrower than the statute's definition of dependent children. Under HEW's view, the "eligible individuals"

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[1] See, e.g., *Stoddard* v. *Fisher,* 330 F. Supp. 566 (D. Me. 1971); *Doe* v. *Shapiro,* 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed,* 396 U.S. 488 (1970); *Arizona State Dep't of Public Welfare* v. *HEW,* 449 F.2d 456 (9th Cir.), *cert. denied,* 405 U.S. 919 (1972). See Comment, "AFDC Eligibility Requirements Unrelated to Need: The Impact of *King* v. *Smith,*" 118 Penn. L. Rev. 1219 (1970).

referred to in §402(a)(10) to whom AFDC had to be furnished promptly were merely those individuals eligible under the *state's criteria*, and *King* v. *Smith* stood at most for the proposition that state rules are invalid only when specific federal statutory prohibition for such rules could be found, or where they were determined to be "unreasonable" by the Secretary. See Brief for the United States as *Amicus Curiae*, *Alexander* v. *Swank*, O.T. 1971, Nos. 70-5032, 70-5021, and *Carter* v. *Stanton*, No. 70-5082, August 1971, pp. 10-12, 15, 21-28.

The Court resolved this dispute in the 1971 term in two cases. In *Townsend* v. *Swank*, 404 U.S. 282 (1971), the Court unanimously invalidated an Illinois rule excluding needy children from AFDC if they were over age 18 and attended college, such children being dependent children according to §406. The Court held that

> "*King* v. *Smith* establishes that, at least in the absence of Congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." 404 U.S. at 286.

In a case decided six months later, the Court reiterated this interpretation of the AFDC program, and again held that federal standards determine who is "eligible" within the meaning of §402(a)(10). *Carleson* v. *Remillard*, 406 U.S. 598, 600 (1972). In *Carleson* HEW again sought to persuade the Court that a state rule must be sustained even where it excludes individuals eligible under federal standards unless a specific statutory prohibition against any such exclusion can be found. See Memorandum for

the United States as Amicus Curiae, O.T. 1971, No. 70-250, pp. 6-7. As it had in *Townsend*, the Court specifically disapproved HEW's policy, with particular reference to HEW's "equitable treatment" regulation.[2] *Carleson* v. *Remillard, supra,* 406 U.S. at 600; *Townsend* v. *Swank, supra,* 404 U.S. at 286, and n. 3.

The New York Work Rules run afoul of this construction of §402(a)(10). Under N.Y. Soc. Serv. L. §131.4, individuals determined to be "employable" pursuant to criteria set forth therein are required to report every two weeks to an office of the State Employment Service (SES) in order to pick up their regular AFDC grant. Such individuals are required to make a "diligent" search for day care for their young children, to follow up on each and every job "referral" made by SES, and, of course, accept any job offer they receive as a result of such referrals.

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[2] 45 C.F.R. §233.10(a)(1)(i), (ii) reads as follows:

(a) *State plan requirements.* A State plan under Title I, IV-A, X, XIV, or XVI, of the Social Security Act must:

(1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. Under this requirement:

(i) States have substantial latitude and corresponding responsibility for determining the coverage, nature and scope of their public assistance programs. Although the public assistance titles define the coverage in which the Federal Government will participate financially, a State may provide coverage on a broader or more limited basis. However, it may not impose any eligibility condition that is prohibited under the Social Security Act.

(ii) The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act.

The failure to comply with any of these requirements, without "good cause," results in such individual's termination from the AFDC grant, and a prohibition against reinstatement for a minimum 30 day period even if the individual is willing to comply before the end of that period. N.Y. Soc. Serv. L. §131.4; 18 NYCRR §385 *et seq.* These eligibility requirements are conceded by all parties as not being *required* by the federal statute.

The only specific requirement pertaining to the mandatory acceptance of work or performance of related obligations appearing in the Social Security Act appears at §402(a)(19), 42 U.S.C. §602(a)(19). That section, fully discussed *infra,* requires each non-exempt AFDC recipient, as a condition of eligibility for AFDC, to register for the Work Incentive Program, §430 *et seq.,* 42 U.S.C. §630 *et seq.,* and provides that AFDC may be denied to such individuals who fail to register, or who, once registered, fail to meet all the requirements imposed upon them by the Work Incentive Program. 42 U.S.C. §602(a)(19)(F). Appellees, however, *have not failed to meet any such requirements.* Although they have met *every* eligibility requirement spelled out in the federal statute, and there is no dispute as to this, they are threatened by New York with exclusion from the AFDC program solely because of §131.4.

The question thus posed, then, is whether there is any clear evidence in either the Social Security Act or its legislative history for the imposition of these eligibility requirements which are in addition to those established by Congress, and which thus exclude from AFDC coverage individuals who qualify under *federal* standards. Compare *Taylor* v. *Martin,* 330 F. Supp. 85 (N.D. Calif.), *aff'd* sub

nom., Carleson v. *Taylor,* 404 U.S. 980 (1972); *Doe* v. *Swank,* 332 F. Supp. 61 (N.D. Ill.), *aff'd sub nom., Weaver* v. *Doe,* 404 U.S. 987 (1971); *Meyers* v. *Juras,* 327 F. Supp. 759 (D. Ore.), *aff'd,* 404 U.S. 803 (1971); *Carpenter* v. *Sterrett,* —— F. Supp. —— (No. 70 F. 138, N.D. Ind. April 24, 1972), *aff'd sub nom., Sterrett* v. *Mother's and Children's Rights Organization,* 409 U.S. 809 (1972). *Amici* will demonstrate below that clear evidence of congressional authorization for exclusions from AFDC on the basis of non-compliance with mandatory work-related requirements such as imposed by §131.4 cannot be found on either the face of the statute, or in its legislative history over the past 35 plus years. Indeed, we believe that to the contrary, a review of the statute and its history indicates a specific congressional intent to prohibit all mandatory work requirements *except* for those applied under the WIN program.[8]

Before reviewing this statutory framework, it is important to recognize that state non-WIN work requirements have not been unheard of in the AFDC program. Several states imposed such rules long before New York's enactment of §131.4. They did so, however, as a result of an interpretation of the Social Security Act by HEW which has since been rejected. Thus, HEW advised the district court in *Woolfolk* v. *Brown,* 325 F. Supp. 1162 (E.D. Va. 1971), *aff'd,* 456 F.2d 652 (4th Cir. 1972), *cert. denied,* 409 U.S. 885 (1972), the first court to invalidate state non-WIN work requirements, that such requirements had always been approved by HEW, despite the fact that Congress

[8] Under *Townsend* and *Carleson,* of course, the burden is on New York to demonstrate congressional authorization for such requirements. Appellees do not have to show a specific prohibition, although we believe such to be the case.

had not mandated them, since they were not deemed to be "unreasonable," and because states were otherwise authorized to restrict their AFDC coverage and exclude individuals who were eligible under federal standards. Brief of the United States as Amicus Curiae, *Woolfolk* v. *Brown*, No. 225-70-R, E.D. Va., Richmond Division, pp. 2-4.[4]

The HEW policy of authorizing state work requirements, expressed in its *Woolfolk amicus*, was adopted prior to the *Townsend* and *Carleson* decisions by this Court, however, and thus its underpinning has been repudiated. Indeed, although HEW has not published any revision of its *Woolfolk* position, and apparently still adheres to that position, see Memorandum on Behalf of the U.S. Department of Health, Education and Welfare as *Amicus Curiae*, *Jefferies* v. *Sugarman*, No. 72-8108, 2d Circuit, p. 3, the Department itself recognizes the implication of these cases on its policy. In the above cited *Jefferies amicus*, although it declined to take a position on the question, HEW noted that

> "Acceptance of employment by an employable person as a condition of eligibility is, apart from the WIN program, a product of state laws and regulations. *It is not a condition of eligibility required by the Social Security Act to be imposed on otherwise eligible AFDC applicants and recipients, nor is State choice in the matter recognized by the Act.* It could thus be argued that state work programs such as New York's are incompatible with the Social Security Act as interpreted by the Supreme Court in *Townsend* because they involve eligibility conditions which are not sanctioned by the Act or by its legislative history, without getting into the question of whether the WIN program preempts the

[4] The *Woolfolk* court rested its decision on the basis of the "preemption" argument advanced by appellees and did not reach the §402(a)(10) question.

state's work rules by reason of irreconcilable conflict between the federal and state standards." *Id.* at 5 (emphasis added).

HEW's *Jefferies amicus* goes on to cite *Meyers, Taylor* and *Doe*, cited by *amici* at pages 12-13, *supra*, noting that in these cases the Court "summarily affirmed three district court decisions striking down AFDC eligibility conditions based on the parent's cooperation in securing support from an absent spouse. *These decisions held that absence in the Social Security Act of express or implied authority for such conditions was a bar to their imposition.*" *Ibid.* (emphasis added).

In light of the discredited rationale for HEW's approval of state work requirements in AFDC, this Court should pay little deference, if any, to its practice of approving of such eligibility tests in other states.[5] HEW's interpretation of the Social Security Act to permit the states to narrowly define eligibility has resulted in the use of a wide variety of illegal rules by the various states. As noted in *Carleson* v. *Remillard*, *supra*, for example, twenty states used exclusionary eligibility rules similar to California's which denied AFDC to families of absent servicemen. 406 U.S. at 602, n. 3. Indeed, the failure of the federal agency to make any revision whatsoever in 45 C.F.R. §233.10(a)(1)(i), (ii),[6] after this Court's explicit rejection of that regulation 15 months ago in *Townsend*, and again 9 months ago in *Carleson*, see complaint, *NWRO* v. *HEW*, *supra*,

[5] HEW has never, to *amici's* knowledge, approved New York's program. Indeed, the last official communication to New York seriously questioned many aspects of the work rules, including, for example, the check pick-up requirement. Appendix, p. 203, exhibit 16. See *King* v. *Smith*, *supra*, 392 U.S. at 317, n. 11, 326, n. 23.

[6] See note 2, *supra* at 11.

renders suspect any argument they might offer in support of state work rules under §402(a)(10).

A. The Social Security Act and Its Legislative History With Regard to Compulsory Work Requirements

Amici contend that the Social Security Act and its legislative history demonstrate that at the time of enactment in 1935 there was an unambiguous congressional intent to extend federally funded AFDC benefits to all otherwise eligible dependent children *regardless* of whether the caretakers of such children agree to accept employment; that a limited and brief departure from this intent was countenanced during the mid-1960's; and that since 1968 the Congress has authorized a work condition of eligibility for AFDC *only* when such work requirements are administered through the Work Incentive Program run by the U.S. Department of Labor. Indeed, a review of the original enactment, subsequent amendments to the Act, and the extensive legislative history on the subject, will demonstrate that Congress specifically rejected the type of eligibility requirement New York now seeks to impose in its AFDC program. *Amici* believe that this clear legislative intent may best be discerned by a chronological analysis of the relevant AFDC legislation since 1935, which is set forth below.

1. *The Original Enactment in 1935*

The AFDC program was enacted as Title IV of the Social Security Act, Pub. L. 74-271, 74th Cong., 1st Sess. (1935), its single-minded purpose being to enable "each state to furnish financial assistance, as far as practicable under the conditions in such state, to needy dependent children," §401, 49 Stat. 627, which children were then defined

inter alia as children "under the age of sixteen who [have] been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who [are] living with [a specified relative]. . . . ", §406, 49 Stat. 629. There was absolutely nothing on the face of Title IV remotely resembling a work requirement for the relatives caring for the eligible dependent children, or suggesting Congressional approval for such requirements. The explanation for this may easily be found in the legislative genesis of Title IV.

As observed by this Court in its first AFDC case, "[t]he AFDC program was designed to meet a need unmet by programs providing employment for breadwinners." *King v. Smith, supra,* 392 U.S. at 328. Thus, the Committee on Economic Security, in its Report to the President, recommended several programs to combat the depression and provide "economic security"—an "employment assurance" program for those able to work who were unemployed; an unemployment compensation program to "increase the security of all who are employed"; an "old-age security" program consisting of a contributory insurance component and a noncontributory needs-related "pension" program; and a needs-related program for the "security of children." H.R. Doc. No. 81, 74th Cong., 1st Sess. (1935), at 3, 4, and 5. As the Committee noted, "[t]he measures we suggest all seek to segregate clearly distinguishable large groups among those now [1935] on relief or on the verge of relief and to apply such *differentiated* treatment to each group as will give it the greatest practical degree of economic security." *Id.* at 5 (emphasis added).

With respect to the children's program (AFDC), the Committee urged federal funding to enable the states to

continue or expand existing "mothers pension" programs which are

> "designed to *release from the wage-earning role* the person whose natural function is to give her children the physical and mental guardianship necessary not alone to keep them from falling into social misfortune, but more affirmatively to rear them into citizens capable of contributing to society." *Id.* at 30. (Emphasis added.)

See also Social Security Board, *Social Security in America* (1937), at pp. 233-34. The Administration accepted the Committee's recommendation for a program which would make it possible for mothers in one-parent families to remain at home and care for their children, and in its proposed "Economic Security Act" it articulated this purpose by defining "dependent children," the beneficiaries of the program, as

> "children under the age of sixteen in their own homes, in which there is *no adult person, other than one needed to care for the child or children, who is able to work* and provide the family with a reasonable subsistence compatible with decency and health." H.R. 4120, 74th Cong., 1st Sess. (1935), §203 (emphasis added).

The House Committee on Ways and Means reported to the House a modified version of the President's program. In the House bill, "dependent child" was defined to mean any

> "child under the age of sixteen who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt in a residence maintained by one or more of such relatives as his or their own home." H.R. 7620, §406.

Under the House bill, then, in order to qualify for aid the needy child had to be living with a near relative, but strikingly more liberal than the Administration's original proposal, was the apparent inclusion of needy children in homes in which both parents were present. Such a bill, which passed the House, would have in effect been a general relief program for all needy families with children under 16 years of age had it been enacted.[7]

The proposed Act was again modified before it reached the Senate floor. The Finance Committee amended §406 to limit the definition of "dependent child" to include needy children under 16 living with a near relative only when the child "has been deprived of parental support or care by reason of the death, continued absence from the home or physical or mental incapacity of a parent." Under the Committee proposal, which, as noted earlier, was accepted by the Senate and enacted into law, Pub. L. 74-271, 74th Cong., 1st Sess. (1935), §406, families in which both parents were healthy, and resided at home with the children, were rendered ineligible. It would appear, then, that the Senate (and the Congress) accepted the original Administration concept for AFDC, albeit using slightly different words to accomplish this purpose. That concept was a federally funded assistance program for families in which there was

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[7] Despite the inclusion of intact families in H.R. 7620, the Committee Report indicates that a major concern of the House was the "families lacking a father's support. . . . Nearly ten percent of all families on relief are without a potential breadwinner *other than a mother whose time might best be devoted to the care of her young children.*" H. Rep. No. 615, 74th Cong., 1st Sess. (1935), p. 10. (Emphasis added.) The Committee specifically noted that there were over 350,000 families on relief, the head of which was a "widowed, separated, or divorced mother and whose other members were children under 16." *Ibid.* Nonetheless, the Committee, and the House, did not limit the proposed program to such families.

only one healthy parent who was needed to remain home and care for the child full-time.[8]

Confirmation of this may be found in the description of the program's beneficiaries by the Senate Finance Committee in terms remarkably similar to the proposed statutory language in the Administration's bill. The beneficiaries were to be "the children in families which have been deprived of a father's support and in which *there is no other adult than one who is needed for the care of the children.*" S. Rep. No. 628, 74th Cong., 1st Sess. (1935), p. 17 (emphasis added). These were the children who could "not be benefited through work programs or the revival of industry." *Ibid.* See *King* v. *Smith, supra,* 392 U.S. at 328.

The above interpretation of the original AFDC legislation offered by *amici* is consistent with the interpretation given it by HEW and its predecessor federal agencies which have administered the program since its inception. Thus, in the federal *Handbook of Public Assistance Administration,* Pt. IV, §3401.1 (1946), it was noted that AFDC "is designed to provide as adequately as possible, such assistance and service as are essential to the rearing of children in family homes" and that such aid permits the mother in an AFDC family "to exercise some degree of *choice* as to what course of action she should follow with respect to seeking or continuing employment. . . ." The federal agency specifically recommended that state

[8] Eligibility for AFDC is based on the death, absence, or incapacity of *either* parent, although it is true that most AFDC cases are families headed by the *mother*. In New York, for example, less than 1% of AFDC cases are headed by the father. See "Characteristics of ADC Families in New York State, January 1971," NYSDSS, Program Analysis Report No. 50 (September 1972), p. 22.

agencies *not* adopt "any policy of denying or withdrawing aid to dependent children as a method of bringing pressure upon women with young children to accept employment." *Ibid.*[9] Recognizing the rationale for the program enunciated in the above legislative history, the original Bureau of Public Assistance noted that "in cases of families receiving aid to dependent children, children are already, in most instances, deprived of the care of one parent, and therefore, need the protection and personal supervision of the available parent." *Ibid.*

In sum, whatever one might say about changing public conceptions as to the purposes of AFDC, it is clear that Congress in 1935 hardly intended to authorize the states to force AFDC mothers out of the home and into jobs in order to qualify for AFDC. It provided federal funds to accomplish the reverse—to help such mothers stay at home full time in order to rear their children.

2. *The 1950 Amendments*

Under the original AFDC legislation, the federal government offered matching funds for assistance provided only on behalf of the dependent child; any aid paid to meet the needs of the child's caretaker relative was not subject to federal matching. See Pub. L. 74-271, §406(b), 49 Stat. 629. It was subsequently recognized that this failure discouraged states from providing aid to meet the relative's needs, and as a consequence, the caretaker, who was pre-

[9] While this policy was only "recommended," it must be remembered that HEW's and its predecessor's view of the Social Security Act was that Congress did not intend to mandate eligibility criteria on state welfare agencies, and thus it had no authority to *prohibit* such rules unless they were "inequitable." See 45 C.F.R. §233.10(a)(1); *Townsend* v. *Swan*, *supra*. See *supra* at 13-14.

vented from working because he or she was caring for the child, "would be forced to share in the meager payments made to the child." *Rodriguez* v. *Vowell*, —— F.2d —— (No. 72-1663, 5th Cir. Jan. 24, 1973), at 5. See House Committee on Ways and Means, Hearings on H.R. 2892 and H.R. 2893, 81st Cong., 1st Sess. (1949), at 14, 399.

In order to remedy this problem, the Administration recommended, and Congress accepted an amendment to §406(b) redefining "aid to dependent children" to include payments made "to meet the needs of the relative with whom any dependent child is living. . . ." §406(b)(1), 42 U.S.C. §606(b)(1), originally added by Pub. L. 81-734, §323, 81st Cong., 1st Sess. (1950), 64 Stat. 551. In advocating the need for this amendment, the House Committee on Ways and Means explained that

> "[i]n the present law, aid to dependent children is defined as payments with respect to a dependent child. No specific provision is made for the need of the parent or other relative with whom the child is living. Particularly in families with small children, *it is necessary for the mother or another adult to be in the home full time to provide proper care and supervision.*" H. Rep. No. 1300 to accompany H.R. 6000, 81st Cong., 1st Sess. (1949), at 46 (emphasis added).

Thus, Congress again articulated its concern that AFDC be made available to enable mothers in one-parent families to provide care for their children by freeing them from the wage-earning role, surely a concern that is inconsistent with the view that Congress intended at the same time to authorize state eligibility rules that forced mothers to accept work.

3. *The 1956 Amendments*

In 1956 Congress amended §401, the general "purpose" section of Title IV, to state for the first time that the AFDC program objective was "to help maintain and strengthen family life and to help . . . parents or relatives to obtain the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection." Pub. L. 84-880, §312, 84th Cong., 2d Sess. (1956), 70 Stat. 848. The State appellants rely on this purpose as establishing a Congressional intent to authorize state work programs (Br. 22). Such reliance is completely misplaced.

This amendment to §401 was accomplished simultaneously with amendments to the "purpose" provisions of *each* of the other categorical titles as well, all designed to express similar objectives ("self-care," "self-support," "independence," etc.), see Pub. L. 84-880, §§311, 313, 314, and each such amendment was implemented by the addition of a "plan requirement" to each categorical program mandating that a description of those rehabilitative *social services* that would be provided to recipients in order to assist them in fulfilling the new program objectives be included in the state plan. See 42 U.S.C. §§302(a)(10)(C) [OAA]; 602(a)(13)[AFDC]; 1202(a)(13)[AB]; 1352(a)(12)[APTD][10] as added by Pub. L. 84-880, §§311(b), 312(b), 313(b) and 314(b).[11] Federal matching was thereby

[10] The U.S. Code sections cited here are as renumbered subsequent to 1946, but are substantially identical to the provisions as added by Pub. L. 84-880. Other services provisions in Title IV are discussed later in this brief.

[11] Section 401 as amended in 1956 specifically provides that the new Congressional objective was to be furthered by the provision of "other services."

authorized for expenses in providing social services. See Pub. L. 84-880, §§311(c), 312(c), 313(c), 314(c), 70 Stat. 848-49. As Congress described these amendments, they were all designed to help "to strengthen family life and [to help] needy families and individuals attain the maximum economic and personal independence of which they are capable." Pub. L. 84-880, §300, 84th Cong., 2d Sess. (1956), 70 Stat. 846.

Surely these 1956 amendments were not intended to authorize compulsory work for the blind and disabled, and we doubt appellants would so argue, yet in the face of the original Congressional intent in AFDC outlined above, its reliance on these provisions to justify work-related eligibility conditions for AFDC would require such a conclusion. Moreover, relating to the provision of social services, the 1956 amendments surely did not countenance the adoption of *mandatory* work rules, since the acceptance of social services by recipients in the federal welfare programs has always been voluntary with the recipients. See, e.g., 45 C.F.R. §220.16(c).[12]

In short, the 1956 amendments were *not* a radical departure from the original congressional scheme for AFDC, but merely represented an affirmation of a non-cash alternative designed to facilitate rehabilitation by increasing

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[12] For example, HEW implemented the 1962 services amendments, discussed *infra* p. 27, by declaring that "[s]ervices aimed at helping the individual and family are based upon the client's interest and desire for help with his problems and upon respect for his right to freedom of choice in accepting or rejecting agency offers of service." HEW, *Handbook of Public Assistance Administration*, Pt. IV, §4241, *Definition of Social Services* (1964). Of course, services related to WIN may not be entirely voluntary. See 45 C.F.R. §220.16(c) and discussion *infra*, p. 31.

the alternatives open to recipients to lift themselves out of poverty.

4. *The 1961 and 1962 Amendments*

In 1961 Congress expanded the definition of "dependent child" in §406 to include, at the option of the states, children "deprived of parental support or care by reason of the unemployment . . . of a parent. . . ." §407, 42 U.S.C. §607, as added by Pub. L. 87-31, §1, 87th Cong., 1st Sess. (1961), 75 Stat. 75. Under §407, two parent families in which neither parent was incapacitated could, for the first time, qualify for AFDC. The exclusive focus of the original enactment in 1935, namely children who could not benefit by congressional steps to revive employment opportunities, was thereby altered in those states which adopted this new option.

Recognizing that this new group of eligible children *could* be benefitted by the employment of their "breadwinner," Congress mandated that states availing themselves of the AFDC-U option require parents eligible by reason of their unemployment to accept any bona fide offer of employment made by an employer, or by the public employment office in the state. Pub. L. 87-31, §1, 75 Stat. 75.[13] For the first time, Congress authorized the states to require acceptance of work as a condition of eligibility, but it did so *only* in the case of those families which had two able-bodied parents to take care of the children.

In 1962, one year later, Congress added another provision to the Social Security Act which had the effect of authorizing the states to compel work as a condition for the con-

[13] This provision was found in former §407(2)(B) of the Act.

tinued receipt of AFDC. Section 409, 42 U.S.C. §609, as added by Pub. L. 87-543, §§101(b)(2)(E), 105(a), 76 Stat. 180, 186, 87th Cong., 2d Sess. (1962), and repealed by Pub. L. 90-248, §204(c)(2), 90th Cong., 1st Sess. (1968), 81 Stat. 892. Section 409, entitled "Community Work and Training Programs," authorized the states, at their option, to set up programs whereby AFDC recipients over age 18 would be compelled to accept work on public projects, at not less than the minimum wage (if applicable) or the prevailing wage rate, as long as such projects satisfied certain health and safety standards prescribed by the Congress.

Programs under §409 were to be administered by the state welfare agency and, indeed, work assignments were to be either with that agency or some other public agency. Refusal of any AFDC recipient to accept such a work assignment without "good cause" was specifically designated as grounds for a state's denial of AFDC to such recipient. 42 U.S.C. §609(a)(1)(G). In other words, Congress intended that participation in a community work and training (CW&T) project would be a permissible condition of AFDC eligibility.

While the provisions of §409 were not restricted on their face to the two-parent families eligible under §407 because of the unemployment of a parent, Congress expected that the CW&T programs would "be used primarily for the unemployed fathers." H. Rep. No. 1414, 87th Cong., 2d Sess. (1962) at 16; S. Rep. No. 1589, 87th Cong., 2d Sess. (1962) at 12.[14] The thrust of §409 was directed at the two-

[14] In states that chose to extend work programs under §409 to one parent families eligible because of the death or absence of a parent, appropriate day care for the children had to be arranged. 42 U.S.C. §609(a)(4); H. Rep. No. 1414, *supra* at 16; S. Rep. No. 1589, *supra* at 12.

parent families added by the 1961 AFDC-U amendment since, as the two congressional committees noted, that amendment had "introduced, *for the first time,* an identifiable group of employable people into the federally aided public assistance programs" and, as a consequence, both congressional committees believed provision "must be made to deal with the problem of useful work for the unemployed parent." H. Rep. No. 1414, *supra,* at 15; S. Rep. No. 1589, *supra,* at 11 (emphasis added). As a matter of fact, from the inception of §409 HEW recognized that "[i]n most instances the employable father will be the participant in this program," HEW *Handbook of Public Assistance Administration,* Pt. IV, §3462.2 (1963), repealed, Handbook Transmittal No. 149 (1969), and of the eleven states which adopted CW&T prior to its repeal in 1968, *all* had AFDC-U programs and concentrated its functioning on the AFDC-U families. See Message From the President of the United States, H. Doc. No. 76, 90th Cong., 1st Sess. (1967), at 25, 27. In sum, the 1961-62 AFDC amendments authorized state work requirements for the first time, and did so primarily because of the addition of two parent families to the AFDC program.

The 1962 amendments were also noteworthy for their significant expansion of federal assistance to the states for the provision of social services. See *King* v. *Smith, supra,* 392 U.S. at 325, n. 22. Thus, Congress added a new plan requirement to AFDC providing for the "development and application of a program for . . . welfare and related services for each child who receives [AFDC]," Pub. L. 87-543, 87th Cong., 2d Sess. (1962), §103, 76 Stat. 185, and in addition, increased federal matching to 75% for those services which were provided to recipients in order

to help them "attain or retain capability for self-support or self-care," or to strengthen family life or prevent or reduce dependency, Pub. L. 87-543, §101(a)(2), 76 Stat. 175. While services were to be provided by the states to enhance potential for self-support, as noted above such services were to be provided *only* when requested by a recipient, HEW *Handbook of Public Assistance Administration*, Pt. IV, §4241 (1964), and they hardly provide support for the imposition of compulsory work requirements.

5. *The 1967 WIN Amendments*

The 1967 amendments to the Act (signed January 2, 1968), enacted by Pub. L. 90-248, §204, 90th Cong., 1st Sess. (1968), 81 Stat. 884, were, of course, the most critical with respect to the issue of the states' authority to mandate acceptance of work as a condition of eligibility for AFDC. Those amendments, discussed fully in appellees' brief, established an entirely new segment of the AFDC program, the Work Incentive Program (WIN), Part C of Title IV, to be administered not by HEW, but by the U.S. Department of Labor. In so doing, the Congress repealed the authority for work and training programs under §409, and repealed the provisions of the AFDC-U program referred to earlier which had previously authorized compulsory work requirements for AFDC-U administered by state welfare departments.

Amici contend that these provisions evidence a specific congressional intent to authorize the denial of AFDC for refusal to work *only* when such refusals occur within the framework of the WIN program. An examination of the parameters of WIN, and its immediate legislative history, will demonstrate that Congress' overriding solicitude for the care of children in their own homes by their remaining

parent was modified to account for changing conceptions as to the employability of AFDC mothers, but that the original congressional concern for "single" parents and their children was *not* thereby abandoned. Instead, Congress carefully devised a program to maximize the employment potential of such mothers which would not impede their ability to function as parents, and which would at the same time offer the best hope for their entrance into meaningful employment on a permanent basis.

The WIN amendments as enacted in 1968 required each state AFDC plan to provide for the "prompt referral to the Secretary of Labor" of "each appropriate" recipient of AFDC over age 16 for "participation under a work incentive program established by part C." 81 Stat. 890 (former §402(a)(19)(A)). Congress carefully limited the welfare agency's discretion in determining who was "appropriate" for referral to WIN by specifically exempting from referral persons who were incapacitated, geographically remote from WIN projects, attending school, or required in the home to care for others. *Ibid.* (former §402(a)(19)(A)(iv), (v), (vi), (vii)). Furthermore former §402(a)(19)(F), 81 Stat. 891, specifically provided that individuals referred to the Secretary of Labor under §402(a)(19)(A) or under §407(b)(2) (AFDC-U)[15] who were found *by the Secretary of Labor* to have refused participation in WIN without good cause must be denied AFDC until they were willing to participate. Standards for determining whether a recipient had "good cause" for a job refusal were, of course, set by the Secretary of Labor. Moreover,

[15] The AFDC-U program was simultaneously amended to require that AFDC-U fathers be referred to the WIN program within 30 days of receipt of AFDC, Pub. L. 90-248, §203(a), 81 Stat. 883. See *infra* at 36, and note 17.

such grant reduction penalties for refusal to participate could not be invoked by the state welfare agency for 60 days if, during such period, the uncooperative recipient "accepts counseling or other services (which the state agency shall make available . . .) aimed at persuading such [recipient] . . . to participate in such program in accordance with the determination of the Secretary of Labor." *Ibid.*

There were three basic types of programs which the Secretary of Labor was instructed to establish. First, direct placement into regular employment and on-the-job training; second, institutional and work experience training for individuals who were likely to obtain regular employment as a result of such training; and third, special work projects for those for whom jobs in the regular economy could not be found. 81 Stat. 884-85 (former §432(b)). These programs were required to be established by the Secretary of Labor in each state and political subdivision thereof in which a "significant number" of individuals receive AFDC. In other areas the Secretary of Labor was directed to "use his best efforts" to either set up programs or transport recipients to other programs. 42 U.S.C. §632(a).

Congress required the Secretary of Labor to provide testing and counseling to determine which type program, if any, was most suitable for a particular recipient, priority being given to regular jobs or training, 81 Stat. 885 (former §433(a)), and to develop an "employability plan" for those suitable persons referred to him "which shall describe the education, training, work experience, and orientation which is determined that each such person needs to complete in order to enable him to become self-

supporting." 81 Stat. 885 (former §433(b)). Moreover, in addition to the counseling, testing and referral services regularly made available through the Federal-State Employment Service System, the Secretary of Labor was directed to provide

> "program orientation, basic education, training in communications and employability skills, work experience, institutional training, on-the-job training, job development and special job placement and followup services, required to assist participants in securing and retaining employment and securing possibilities for advancement." 42 U.S.C. §633(d).

Finally, in conjunction with the enactment of the WIN program, Congress added two new provisions to the AFDC program relating to the provision of social services to enhance the potential employability of AFDC recipients. The first required the development of a services "program" for adult recipients as an addition to that already mandated for the children in 1962, such services designed to assist recipients in attaining capability for "self-support" and to strengthen family life and foster child development. See §402(a)(14), 42 U.S.C. §602(a)(14), as added by Pub. L. 90-248, §201(a)(i)(B), 81 Stat. 877. The second required the development of a program for each "appropriate" recipient designed to help such individuals find employment, and mandated that such programs would be implemented by the states by providing child care and family planning services to persons "referred" to the new WIN program. See §402(a)(15), as added by Pub. L. 90-248, §201(a)(1)(B), 81 Stat. 878 (substantially revised by Pub. L. 92-223, §3(a)(1), discussed *infra* at 41).[16]

[16] These services were matched at the same 75% rate set by the 1962 amendment for services "specified" by the Secretary of HEW. Pub. L. 90-248, §201(c), 81 Stat. 879.

As can be readily seen even from a quick perusal of these provisions, with the adoption of WIN Congress set up a detailed framework within which AFDC recipients would be tested, counseled, trained, and provided social and manpower services to enable them to achieve maximum self-support consistent with their parental responsibilities. *Amici* fully agree with appellees' contention that this substantial federal intervention in the area of recipient/work programs was intended to preempt state legislation on the subject. At this point, however, quite apart from the preemption issue, we strenuously urge that the specificity of the statute, its broadsweeping range, and its intricate network of protections and services offered to recipients, hardly may be said to "clearly evidence" an intent to authorize state *non-WIN* work requirements that operate to deny AFDC to individuals refusing to cooperate with such requirements but who are willing to cooperate with all demands made upon them by the Secretary of Labor in the WIN program. A review of the legislative history of WIN will confirm this interpretation.

a. The Administration's proposal

After five years experience with the CW&T programs established by §409, HEW submitted a proposal to the Congress which would have retained that program *and* established an entirely new federally-administered work-referral program. H.R. 5710, 90th Cong., 1st Sess. (1967), provided *inter alia* for the establishment of CW&T programs to be operated not by the states, but by the Secretary of Labor, H.R. 5710, §204(i) (proposing a new §410 to the Act), and to which the states would be *required* to refer "all appropriate individuals" over 16 who were receiving AFDC, H.R. 5710, §204(a) (proposing a new §402

(a)(15) to the Act), and for the addition of a new requirement to the AFDC program which would have forced each state to implement a CW&T program conforming to §409

> "only if the Secretary of Labor or his delegate does not maintain and operate any work or training program as authorized under section 410 in the State, and has certified that it is not practicable for him to maintain and operate a program anywhere in the state." H.R. 5710, §204(a) (proposing a new §402(a)(16) to the Act).

Individuals refusing to accept employment offered under either the new Department of Labor program or under a §409 CW&T program where that was in effect would be denied AFDC unless they had "good cause" for such refusal. *Ibid.*

In 1967, at least, HEW understood the basic inconsistency in the side-by-side operation of state work rules and a special Department of Labor work referral and manpower services program. As explained by HEW, its proposal "would provide for programs to be operated by the States *if* the Secretary of Labor did not operate a program and found it impractical to do so throughout a state. . . ." Comm. on Ways and Means, Committee Print, Section-By-Section Analysis and Explanation of Provisions of H.R. 5710, 90th Cong., 1st Sess. (1967), at 8 (emphasis added).

Thus, the original 1967 proposal continued the authorization for state-operated CW&T programs and referral thereto as an eligibility condition for AFDC, and added a new eligibility condition to be imposed *in place of* the §409 program wherever the Department of Labor created its own CW&T program.

b. The House bill

The House approach was different than the Administration's. While the House bill also would have required each state to establish a community work and training program under §409, see H.R. 12080, 90th Cong., 1st Sess. (1967), §204(b) (proposing a new §402(a)(21)), it rejected the Administration's suggestion that an entirely new work program be established and maintained by the Secretary of Labor. In its place, the House bill aded two new AFDC plan requirements. The first mandated each state to "assure that all appropriate [recipients of AFDC] . . . register and periodically reregister with the public employment offices of the State," H.R. 12080, §204(b) (proposing a new §402(a)(19)). The second required that such registration and the acceptance of "employment in which [the recipient] is able to engage and which is offered through the public employment offices of the State or is otherwise offered by an employer," or participation in a §409 project, be imposed as a condition of eligibility for AFDC, H.R. 12080, §204(a) (proposing a new §402(a)(20)). Parallel requirements were added to the AFDC-U program by the House bill, H.R. 12080, §203(a) which in essence were the same as those originally included in §407 in 1961, 75 Stat. 75, see *supra*, at 25.

In addition to these mandatory work requirements, the House proposed to add a provision which would have required "the development of a program" for each appropriate recipient with the objective of assisting such recipients to enter the labor force and of preventing illegitimate births, and "the implementation of such programs" by the provision by the welfare agencies of such employment-related services as "child-care services and testing, coun-

seling, basic education, vocational training, and special job development. . . ." H.R. 12080, §201(a)(1).

The House bill thus proposed a condition for AFDC eligibility remarkably similar to that imposed by New York's work rules, and would have placed the responsibility for the operation of the proposed work program, including the provision of manpower services, on the state welfare agency under the supervision of HEW. Standards "to protect mothers from undue hardship in work and training assignments" would be issued by HEW, H. Rep. No. 544, 90th Cong., 1st Sess. (1967), at 104, and determinations as to whether or not a refusal to work was with "good cause" would be made at a "fair hearing," which is the administrative responsibility of the state welfare agency under 42 U.S.C. §602(a)(4). *Ibid.* If the House bill had been enacted into law, a reversal of the decision below might well be appropriate. It was not, however.

c. The Senate bill

The Senate version of H.R. 12080 with respect to the work requirements therein, and with certain modifications, was enacted by Congress. As noted earlier, the Work Incentive Program which was established therein was to be run by the Department of Labor, *not* by HEW and the state welfare agencies. The Senate thus borrowed one of the concepts originally advanced by the Administration in H.R. 5710. In addition, provisions in the House bill requiring registration with public employment agencies and acceptance of any bona fide job offer were deleted by the Senate bill, as was the requirement of both the Administration's and House bills that §409 community work and training programs be established in each state. Indeed, as

noted above, the Senate bill *repealed* §409, Pub. L. 90-248, §204(c)(2). Moreover, the Senate amended the provisions dealing with unemployed fathers, §407, 42 U.S.C. §607, to require that states refer such fathers to the Secretary of Labor under the new WIN program within 30 days. H.R. 12080 as passed by Senate, §203(a), enacted §407(b)(2)(A), 42 U.S.C. §607(b)(2)(A). The Senate added this provision, and deleted the House-proposed requirements and the existing 1961 requirements that AFDC-U be denied when fathers rejected bona fide job offers made by public employment agencies or by employers, in order to "tie the program to the work incentive program established by the bill." S. Rep. No. 744, 90th Cong., 1st Sess. (1967), at 160; Conf. Rep. No. 1030, 90th Cong., 1st Sess. (1967), at 58.[17]

Finally, the Senate accepted the thrust of the House amendments relating to the provision of social services to enhance employability, but revised the House bill in order to place the responsibility for the manpower services with

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[17] The repeal of the provision requiring AFDC-U fathers to accept any bona fide job offers as a condition of eligibility, and its replacement by the provision requiring referral of such individuals to WIN within 30 days, demonstrates that the County appellants' reliance on §407, and its original 1961 legislative history (Br. 18), is completely misplaced. Section 407 as currently written merely requires AFDC-U fathers to register with public employment offices, 42 U.S.C. §607(b)(2)(C), but termination of AFDC-U for refusal to work by such fathers is governed solely by WIN, 42 U.S.C. §602(a)(19)(F). Moreover, the provision of §407 on which appellants specifically rely, 42 U.S.C. §607(b)(1)(B), which provides that AFDC-U may be provided only when a "father has not without good cause, within such period (of not less than 30 days) as prescribed by the Secretary, refused a bona fide offer of employment or training for employment," on its face does not apply to deny AFDC-U *after* the prescribed time period, which is 30 days (45 C.F.R. §233.100(a)(3)(ii)). After that period, eligibility is governed exclusively by WIN regardless of any prior job refusals.

the Department of Labor which was to administer the work program, retaining within the welfare agency the responsibility for providing such supportive social services as child care and homemaking services. See H.R. 12080, as passed the Senate, November 22, 1967, §201(a)(1), and Conf. Rep. No. 1030, *supra*, at 55. These revisions became Pub. L. 90-248, §201(a)(1), 81 Stat. 881, adding §402(a)(15) to the Act (later amended by Pub. L. 92-223). Those welfare agency services were required "to make it possible for adult members of the family to take advantage of the work and training opportunities under the work incentive program." S. Rep. No. 744, *supra*, at 146.

The conclusions to be drawn from congressional acceptance of the Senate's approach are clear. In rejecting the suggestions for state operated work-referral programs, either under §409, or as a separate condition of eligibility imposed under §402, and in requiring unemployed fathers to be referred to work under WIN, not state work rules, Congress determined that the best approach for maximizing the employment potential for AFDC recipients consistent with their obligation to provide parental supervision rested in a federally-administered manpower services program. The transfer of manpower service functions to the Department of Labor confirms this. Such an explicit determination as to how to proceed with the business of obtaining employment for AFDC mothers is surely inconsistent with the view that Congress at the same time intended to authorize the states to deny AFDC to recipients who failed to participate in state-run work programs. Indeed, the Senate's rejection of the House approach, which relied on state operated programs, and the Administration's, which relied on a combination of state and federal programs, could not have been more explicit.

Referring to its amendments as "a new direction for AFDC legislation," the Senate Report notes that its legislation "incorporates certain desirable changes in the method of administration and program emphasis." S. Rep. No. 744, *supra*, at 146. The Senate Finance Committee stated that while the Committee was in "complete agreement with the purpose of the House bill that as many AFDC recipients as possible become employed and independent . . . the program which we have developed will *better serve* that purpose." S. Rep. No. 744, *supra*, at 147 (emphasis added). Its "program," of course, was to place "full authority . . . responsibility, and accountability" for administration with the federal manpower experts, the Department of Labor. *Id.* at 151-52. The committee envisioned that this approach would be "the most effective" and could be implemented "in the most rapid fashion," at "a lower net cost." *Id.* at 147. The reason for this prognosis is that WIN would utilize "the full range of manpower services provided under legislative authorities available through the Department of Labor. . . ." *Ibid.*

d. Conclusion

Amici believe that the 1967 WIN amendments demonstrate that Congress did not abandon its original concern that AFDC children receive proper parental care and supervision; that it rejected state-operated work referral programs as inconsistent with this primary concern in that the lack of direct federal control over such programs made it difficult to assure that they were sufficiently protective of recipient needs, and since they were not administered by agencies most suited to providing the necessary employment-related services; and that it intended to prohibit the states from denying AFDC to individuals otherwise eli-

gible under federal law even if they refused work referrals, *unless* such referrals were pursuant to the WIN program. As the Finance Committee noted, persons not "appropriate" for referral to WIN "would not be placed in *any* work situation unless they chose to request employment or training." S. Rep. No. 744, *supra*, at 147 (emphasis added).

6. *The 1971 Amendments*

Public Law 92-223, 92d Cong., 1st Sess. (1971), §3 (the "Talmadge Amendment"), enacted in December 1971, provided for a series of changes in the WIN program which became effective on July 1, 1972, and which were intended "to make a number of needed improvements in the work incentive program." 117 *Cong. Rec.* S20569 (Daily ed. December 4, 1971) (remarks of Sen. Talmadge). *Amici* contend that these revisions of WIN emphasize Congressional intent that AFDC recipients not be forced to work except through the apparatus of the WIN program. A brief description of some of these revisions follows.

First, obviously dissatisfied with even the minimal discretion afforded the states by the 1967 amendments to define which recipients were "appropriate" for "referral" to WIN, Pub. L. 90-248, §204(b), 81 Stat. 890, see *supra* at 29, the Talmadge amendment eliminated this provision and required instead that "*every* individual, as a condition of eligibility for aid under [Title IV] . . . shall register for manpower services, training and employment as provided by regulations of the Secretary of Labor. . . ." §402(a)(19)(A), as amended by Pub. L. 92-223, §3(a)(2), 42 U.S.C. §602(a)(19)(A). Exemptions from this mandatory registration requirement are also set forth by Congress, and include children under 16, full-time students, incapacitated

persons, those "so remote" from a WIN project that "effective participation is precluded," those needed in the home to care for another member of the household, mothers with children under six, and mothers in two parent families where the father registers. *Ibid.*

Second, recognizing that cooperation between the state welfare agency and the Labor Department component operating WIN in the state was essential to the successful operation of WIN, Congress took steps to mandate such coordination. Thus, the Talmadge amendment requires each state to establish a "separate administrative unit" (SAU) of its welfare agency which would be responsible for providing necessary social services to WIN registrants, and which "to the maximum extent feasible" would perform services *only* in connection with WIN. §402(a)(19)(G), as amended by Pub. L. 92-223, §3(a)(6)(ii), 42 U.S.C. §602(a)(19)(G). Congressional intent to focus welfare agency administration on the WIN program, and *not* on independent state work programs, is clearly evident in this provision.

In addition, the SAU is specifically directed "to participate in the development of . . . employability plans [with the Labor Department] under section 433(b) . . . ," and to provide "such health, vocational rehabilitation, counseling, child care, and other social and supportive services as are necessary to enable [recipients] to accept employment or receive manpower training *provided under part C* [WIN]." *Ibid.* (emphasis added). Indeed, where, after joint consultation on the employability plan, the SAU and Labor disagree as to the nature of services required to ready the recipient for employment or training, the *Labor* determination is binding. See 29 C.F.R. §56.5(c); 45 C.F.R. §220.35(b)(4). The careful particularization of the role of

the welfare agency in planning for the development of an employment program for AFDC recipients, and readying such recipients for employment, is itself evidence of an intent to restrict the work-related activity of state welfare agencies to the WIN program. Cf. *Townsend* v. *Swank*, *supra*, 404 U.S. at 287.

Thirdly, the Talmadge amendments made absolutely clear Congressional intent that *no* AFDC recipient be required to work or participate in a training program until necessary supportive services are provided through the WIN program. Thus, as mentioned above, the SAU is obligated to provide those supportive services deemed necessary by the manpower agency. Congress clarified the welfare agency's precise obligation vis-a-vis supportive services originally established by the 1967 amendments, Pub. L. 90-248, §201(a)(1), 81 Stat. 877-78, by eliminating the employability services requirement from §402(a)(15), Pub. L. 92-223, §3(a)(1), placing it within the WIN requirement in §402(a)(19), and specifying the minimum services to be provided. Pub. L. 92-223, §3(a)(7). Moreover, federal funding for those services will be matched at a 90% rate, instead of the more usual 75% level at which services are generally matched. §403(d)(1), as amended by Pub. L. 92-223, §3(a)(9), 42 U.S.C. §603(d)(1). Only *after* such services have been provided or arranged, may the welfare agency's SAU "certify" the recipient to the Secretary of Labor as "ready for employment or training under part C [WIN]." 42 U.S.C. §602(a)(19)(G)(ii). It is only those individuals who are so "certified" to Labor who may be terminated from the AFDC program for refusal to accept a job offer or training opportunity (if such refusal was without "good cause" as found by the Secretary of Labor under

42 U.S.C. §633(g)). See §402(a)(19)(F), as amended by Pub. L. 92-223, §3(a)(6)(i), 42 U.S.C. §602(a)(19)(F).[18] Included within this protection are AFDC-U fathers who now must be "certified" to the Secretary of Labor within 30 days, §407(b)(2)(B), as amended by Pub. L. 92-223, §3(a)(10), 42 U.S.C. §607(b)(2)(B).

By adding the explicit provisions on supportive services and certification, Congress was articulating its desire that AFDC recipients not be referred to work or training unless they were emotionally, physically and/or intellectually able to take advantage of that opportunity. It is well understood that AFDC recipients often have special problems which prevent them from working, problems created in large measure because of their poverty, lack of education, and their status as head of household in one-parent families.[19] Thus, supportive services which have to be

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[18] In this regard, the County appellants argument that §402(a)(19)(F) specifically authorizes state work referrals separate from WIN (Br. 16-17) misreads that provision. While §402(a)(19)(F) does provide that AFDC may be denied where recipients refuse bona fide offers of employment without good cause offered by either employers or public employment agencies, in addition to sanctioning the denial of AFDC for refusal to participate in WIN, such a denial of aid may *only* be imposed upon recipients "certified to the Secretary of Labor pursuant to subparagraph (G)," and *only* when the Secretary of Labor (*not* the state welfare agency) finds such a refusal to be without "good cause." The WIN 60 day counseling period applies as well. Thus the language relied upon merely recognizes an additional source of employment opportunities for those whom the *WIN agency* believes are ready for work, and where the *WIN agency* agrees that the job should have been taken under *Department of Labor* standards.

[19] Such problems were recognized by Congress in 1967 when it enacted WIN. See, for example, H. Rep. No. 544, *supra*, at 97-98, where the Committee on Ways and Means, referring to its proposal for services, noted that many recipients had "serious social, vocational, and educational handicaps" and that "much careful and patient work will be needed in order to accomplish the ob-

provided where needed include the following: child care, family planning, health-related services, homemaker services, home management and other functional educational services, housing improvement services, transportation, and vocational rehabilitation services. See 45 C.F.R. §220.35 (b)(2); HEW, *Handbook for the Work Incentive Program*, §§90-100 (1972). Congress sought to maximize the likelihood that recipients referred to work would get off, and stay off, the welfare rolls because they were prepared *in fact*, not theory, for a job. Congress was unwilling to waste federal time and resources on placements which did not offer hope for permanent jobs, even if the initial placement would be "delayed" until the necessary services were provided. Surely it did not intend to authorize states to refer recipients to work outside of this protective and rehabilitative structure which it had designed.

Finally, as if to underscore its intention to rely *exclusively* on WIN as the only mechanism under which AFDC recipients could be denied aid for refusal to work, Congress imposed a financial penalty on states which fail to certify annually to WIN at least 15% of the average number of those "required to be registered." §403(c), as amended by Pub. L. 92-223, §3(a)(8), 42 U.S.C. §603(c). Congress sought by this provision to induce the states to exert maximum efforts to provide the necessary supportive services

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jectives of the bill." In implementing the 1971 amendments HEW noted that "[m]others and caretaker relatives undoubtedly need the most services, particularly if they have no previous work history or have been out of the labor market for a long time. In addition, since women will be carrying two jobs when they enter WIN (homemaking and training or working), they need more preparation to start the program, continue it, and successfully get and hold a job." HEW, *Handbook for the Work Incentive Program*, §50.3 (1972).

required by the Labor Department, and to thereby maximize the number of recipients "ready" for placement. Congress obviously believed that the relationship between certifications and registrations in WIN provided an accurate basis for evaluation of the performance of a state's welfare agency in aiding AFDC recipients in finding jobs. Since the loss of federal reimbursement may not be overcome by any number of non-WIN placements, Congress obviously did not intend to authorize the states to force AFDC recipients to work outside of WIN, simultaneously with imposition of the fiscal sanction based solely on the rate of WIN certifications.

7. *The 1972 Amendments*

Congress' most recent rejection of state work requirements came in the last session. A Senate-passed amendment to H.R. 1, 92d Cong., 2d Sess. (1972), the Social Security Amendments of 1972, would have repealed the 1968 repeal of §409, the community work and training programs, thus reinstating §409 as an operative provision of the Act. Conf. Rep. No. 92-1605 on H.R. 1, p. 29, rejecting Senate amendment #567. (Amendment #567 provided *inter alia* for the repeal of Pub. L. 90-248, §204(c)(2), which provision repealed §409. See 118 *Cong. Rec.* S16802 (Daily ed. October 4, 1972).) This rejection, together with the 1971 strengthening of WIN, confirms Congress' commitment to WIN as the exclusive job referral program in AFDC, and its intent to prohibit the denial of AFDC to otherwise eligible individuals for refusal to accept employment unless such offers are made pursuant to WIN.

B. Practical Distinction Between WIN and the New York Work Requirements

An analysis of some of the practical differences between WIN and the New York work requirements will help to demonstrate why Congress did not authorize states to impose state-administered work requirements as a condition of eligibility for AFDC despite its basic acceptance of an AFDC work-referral program in 1967. Such a comparison is, of course, merely illustrative, since *amici* contend that Congress has prohibited *all* state work tests, Virginia's and Mississippi's, as well as New York's, and that a contrary ruling by this Court would authorize the states to adopt work requirements even more burdensome and unproductive than New York's.[20]

For example, as implemented prior to the injunction below, New York's work rules required persons who were specifically exempted by Congress from compulsory work under WIN, such as mothers with children under age 6, to accept job offers in order to remain eligible for AFDC. See 18 NYCRR §385.1. A reversal of the decision below would enable New York to classify *anyone* as "employable" and subject to the work requirements, since the protections of WIN would be inapplicable. Cf. *Woolfolk* v. *Brown*, *supra*, 325 F. Supp. at 1164.[21]

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[20] *Amici* make this statement in recognition of the fact that it would be well-nigh impossible for HEW or the judiciary to evaluate on an *objective* basis any particular work program in terms of its desirability or likelihood of success, even if the measure of those terms is such a program's *resemblance* to WIN and the procedures and services provided thereunder. Compare 45 C.F.R. §233.10(a)(1)(i), (ii), the "equitable treatment" or "reasonable classification" doctrine, *supra* at 11, n. 2, invalidated in *Townsend* v. *Swank*, *supra* and *Carleson* v. *Remillard*, *supra*.

[21] N.Y. Soc. Serv. L. §131.4 was amended in June 1972 (L. 1972, ch. 941, §1) to provide *inter alia* that, in AFDC, persons shall be

Secondly, under §131.4, the only supportive social services which must be made available prior to referral of an AFDC recipient to a job is child care. As noted in section A of this brief, the federal statute provides that job referrals under WIN may not be made until the welfare agency certifies to WIN that it has provided *all* supportive services which the WIN manpower agency determined to be necessary to ready the recipient for employment, such services including many more than the mere provision of day care. See *supra*, pp. 41 to 43. Congress surely did not intend the states to condition eligibility for AFDC on the acceptance of a job offer *before* those mandated services were provided, particularly in light of the fact that it has left it to the federal manpower experts, and *not* to the welfare agencies, to determine which services are "necessary" in a particular case.

Thirdly, the specific legislative determination to place the authority and responsibility with the Department of Labor for determining whether or not a refusal to accept a job offer was unjustified, and thus requiring AFDC payments to be terminated, is completely frustrated by New York's program. Thus, under WIN, as noted earlier, the standards for determining whether or not a recipient had "good cause" for refusing an offer are developed by the Department of Labor, the agency long accustomed to de-

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"deemed employable in accordance with the provisions of section three hundred fifty-e [WIN registration requirements]." It is unlikely New York believes this amendment requires a redefinition of "employability" since the state has not amended that definition in 18 NYCRR §385.1, perhaps in recognition of the fact that the WIN registration criteria in §350-e have nothing to do with "employability" or readiness for employment. In any case, *amici* note that a reversal would permit New York unfettered discretion to define who must accept work in order to receive AFDC.

veloping such standards for other programs, see 29 C.F.R. §56.25; DOL, Manpower Administration Manual, *Work Incentive Program Handbook*, §9360(7) (1972), and the hearings to resolve questions as to "good cause" are conducted by the Secretary of Labor, whose determinations are binding on the state welfare agency. See 45 C.F.R. §233.11(g). In sharp contrast, such determinations are made under New York's work rules by *welfare* agency personnel at the local level, subject to appeal to the state *welfare* agency at a fair hearing. See, e.g., 18 NYCRR §§385.6, 358.4. New York merely requires welfare officials to "take into consideration the report of the State Employment Service [SES], employment agency *or* prospective employer," 18 NYCRR §385.6(b) (emphasis added), but a *hearing* conducted by SES personnel is not afforded, and thus the input of the manpower agency *where it is obtained,* is adversarial, the aforesaid SES "report" obviously having been prepared by the person who made an initial determination that the refusal was unjustified.

One of the most glaring differences between WIN and the New York rules, and one which has enormous practical consequences, is in the timing of the hearings afforded on refusals to cooperate, and the sanctions imposed for such refusals. In WIN, the Labor Department "good cause" hearings are conducted *prior* to a recipient's being forced to accept the burdens of job placement, or other requirements of participation, see 29 C.F.R. §§57.2-57.11, and as long as the recipient is willing to cooperate with WIN in the event he or she is unsuccessful at the hearing, no interruption in AFDC benefits is suffered. See 42 U.S.C. §602 (a)(19)(F) which provides for the denial of AFDC "if *and for so long* as any child, relative, or individual" re-

fuses to cooperate without good cause (emphasis added). Indeed, under the federal statute, AFDC benefits (in the form of "vendor" payments) continue for an *additional* 60 day "counseling" period *after* the hearing, even where the recipient does not immediately agree to accept a job offer, such counseling "aiming at persuading" the recipient to participate according to WIN's instructions. *Ibid.*

In contrast, under the New York rules a recipient who disputes the propriety of her classification as "employable," or who contests the adequacy of child care arrangements, or the suitability of a particular job, is forced to make an incredible choice. On the one hand, she may request a fair hearing and, if during the pendency of that hearing she does not participate in the state's work program, *i.e.* she maintains the *status quo*, she risks the imposition of a thirty day penalty of ineligibility in the event she does not persuade the hearing officer of the merits of her position. 18 NYCRR §385.7. This penalty is exacted even where the recipient is willing to comply immediately upon being notified of her hearing loss! *Ibid.* On the other hand, if the recipient wishes to escape this sanction, she must agree to comply with *all* of the work rules pending the fair hearing decision. Thus, she must report every two weeks to SES to pick up her AFDC check (an unreimbursed transportation expense), accept the day care arrangement which she may believe to be inadequate, and even accept a job which she may believe is injurious to her health. If her claims are indeed valid ones, the risks of the incorrect welfare agency determination are, of course, enormous.[22]

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[22] The unfairness in this procedure is compounded by the fact that New York takes an inordinate length of time in adjudicating fair hearing requests, particularly in non-*status quo* cases. See,

It is not without significance that a joint federal/state study of the operation of the New York work rules revealed an alarming misclassification rate of approximately 67%. HEW, DOL, NYSDSS, NYSDOL, *Study of Public Assistance Employables,* March 1972, p. 19. Apart from indicating the wisdom of Congress' decision to have *manpower,* not welfare, officials make determinations pertaining to readiness for work, these figures highlight the practical effect of the New York penalty.

Whatever may be said as to the unconstitutionality of New York's procedure, see *Aguayo* v. *Richardson,* —— F.2d —— (2d Cir. No. 72-2195, Jan. 18, 1972), *Jimerson* v. *New York State Department of Social Services,* appeal pending in this Court, O.T. 1972, No. 72-5939, surely Congress did not intend to authorize the termination from AFDC under such procedures when it carefully established a detailed structure for use in work-related termination proceedings. Congress clearly manifested a recognition that since forced work requirements imposed significant burdens and hardships on AFDC families, such requirements were justified only when administered under the fairest of procedures.

Finally, any comparison of New York's requirements and those imposed under the WIN program would be in-

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e.g., *Nelson* v. *Sugarman,* No. 71 Civ. 1719 (S.D.N.Y. Nov. 15, 1972), holding that New York substantially fails to comply with HEW's rule that fair hearings be decided within 60 days of the request, and HEW, DOL, NYSDSS, NYSDOL, *Study of Public Assistance Employables,* March 1972, at p. 20, where it is noted that of the persons claiming to be misclassified as employable as of November 1971 under §131.4, two-thirds had still not had their claims adjudicated in January. The same study revealed that of the remaining one-third who did receive hearings, 61% were found to have been improperly classified. *Ibid.*

complete without a reference to the check pick-up requirement. Under New York's program, all AFDC recipients classified as "employable" are required to report to an office of the State Employment Service every two weeks to receive their assistance checks for the upcoming grant period. 18 NYCRR §385.2. All other AFDC recipients not so classified continue receiving their grants by U.S. mail delivery which, since 1947, HEW and its predecessor have stated provides the "safest and most economical method of getting checks to recipients at the proper time." HEW *Handbook of Public Assistance Administration*, Pt. IV, §5254 (1947). Thus, under the guise of a "work requirement" New York has imposed a personally burdensome and financially injurious condition on the receipt of AFDC which under no stretch of the imagination may be said to have been contemplated by Congress.

Attention should initially be placed on the overwhelming burden which the check pick-up places on the typical AFDC recipient. The pick-up date is scheduled randomly under New York procedures, solely with reference to AFDC case numbers, and is applied inflexibly. Stipulation No. 96, Appendix, p. 189. The reasons any individual may be unable to appear at a particular place at a particular time are too obvious for extended discussion. Suffice to say that they range from reasons of personal convenience (*i.e.*, prior appointment) to unpredictable emergencies (*i.e.*, illness). We, as lawyers, have often experienced this problem when unforeseen circumstances prevent us from appearing in court as scheduled.[23]

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[23] Imagine a case being automatically dismissed, because an attorney is too ill to appear!

The inability of a welfare recipient to report to SES at the designated time without fail is even more predictable and is endemic to assistance programs. The likelihood of sudden illnesses of adult or child is intensified by the high rate of chronic illness and general poor health in the recipient population. There is also the problem of child-care arrangements which suddenly fall through, or lack of transportation because of weather conditions. It is just a fact of life on assistance that one lacks the ability to respond readily to changes in circumstances and to make alternative arrangements. Moreover, it is a given in welfare programs that many families will run out of money before the end of the grant period, or at least have to drastically curtail their food in the last few days of the period, because the grant simply cannot be stretched to provide even subsistence adequacy for the full period. This is particularly so where the state is paying less than its own definition of full need as is New York. N.Y. Soc. Serv. L. §131-a. To expect such a family to have the wherewithal to meet transportation costs or baby-sitter charges on the check pick-up day is ludicrous.[24]

The result of a failure to appear at the scheduled time, however, is disastrous. Even assuming such failure is eventually justified as having been with "good cause," thus

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[24] In a study of operations in New York City conducted during the summer when only HR recipients were covered by the check pick-up (July 12-August 31, 1971), the Community Council of Greater New York found that 45% of those who reported to SES had had problems getting there. Their reasons included lack of money (40.8%), illness or physical handicap (26.5%), difficulty in arranging child care (7.8%). The relatively low incidence of child-care problems at that time is explainable by the fact that only childless individuals or parents in intact families were required to report at that time. It is obviously much higher when heads of one-parent families are required to report.

averting official termination of the AFDC case, a failure to appear quite simply means the family is without funds since reporting to SES is tied to the delivery of the assistance check. Public assistance is a current needs program and grants are made to cover needs which exist at the time payment is received. For example, the grant which a family is due to receive on the 16th of the month is calculated to meet their needs from the 16th through the 30th or 31st; the grant which they received on the 1st calendar day was supposed to provide for their needs from the 1st through the 15th. For those in "brutal need," *Goldberg* v. *Kelly*, 397 U.S. 254, 261 (1970), there is no such thing as dipping into savings when their check is delayed,[25] and since no one else can go in her stead, and since there is no procedure by which the recipient can arrange to have the check promptly delivered to her home, the deprivation is certain and immediate.

Moreover, the loss is not a brief one. Checks not picked up at SES must be returned after one day to the welfare agency, Stipulation No. 101, Appendix, p. 190, and retained at the agency until "appropriate action is taken to release or cancel them," Appendix, p. 75, and that agency must begin "required action" to terminate or reduce assistance. *Ibid.* Thus in these cases the AFDC recipient must appear *personally* at the welfare center to obtain release of the check or wait for the mailing of the check which will not be

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[25] A family cannot become eligible for AFDC if it has savings in excess of $500 per adult (allowed as a burial reserve). 18 NYCRR §§352.22, 352.23. They cannot accumulate savings after coming on the rolls unless they are able to save some money out of the grant, since any outside income or monies received are considered available to meet needs and the grant is accordingly reduced. 42 U.S.C. §602(a)(7).

done until the welfare agency receives her request for a hearing, a procedure guaranteed to insure delay.

The only conceivable justification for the check pick-up requirement is as a "club" to force recipients to appear at SES for scheduled interviews. *Amici* contend that the simple answer to such a contention lies in the *federal* procedure used to compel compliance with the mandatory reporting requirements in WIN, and indeed, the one used by the state to enforce *all other* eligibility conditions. The simple establishment of a requirement that one report for manpower services, as scheduled, in order to continue eligible for aid, divorced from the physical delivery of the assistance grant, achieves its purpose. See, e.g., 29 C.F.R. §56.5(b); DOL Manpower Administration Manual, Work Incentive Program Handbook, §9360(4) (1972). Those who fail to comply without justification lose benefits, and those who fail to comply for a valid reason continue receiving their benefits *when due*. Apart from the constitutional implications in the effective suspension of assistance inherent in the pick-up requirement, cf. *Goldberg* v. *Kelly, supra,* surely the rule in no way furthers a legitimate work eligibility requirement.

Finally, even for recipients who manage to appear at SES when scheduled, and who find their checks waiting for them,[25] the burden of bi-monthly reporting imposes a considerable financial injury. Appellants concede that no funds have been provided by the state to meet the transportation and child care expense necessitated by the re-

[25] The above cited federal/state study noted "significant procedural" errors such as misrouting of checks to the wrong office of SES. HEW, DOL, NYSDSS, NYSDOL, *Study of Public Assistance Employables*, March 1972, p. 11.

porting requirement, Stipulation No. 105, Appendix, p. 191, that welfare budgeting for the "employables" is "on the same basis" as those not required to report, Stipulation No. 97, Appendix, p. 189, and that lack of funds to travel to SES is not "good cause" for failing to report, Stipulation No. 122, Appendix, p. 196. Bi-monthly reporting thus guarantees reduced purchasing power, already exacerbated by the state's decision to meet only 90% of basic needs, calculated at 1968 prices. N.Y. Soc. Serv. L. §131-a. See *Rosado* v. *Wyman*, 322 F. Supp. 1173 (E.D.N.Y.), *aff'd*, 437 F.2d 619 (2d Cir. 1970), *aff'd*, 402 U.S. 991 (1971).[27] See, e.g., Complaint, Appendix pp. 26-29.

Amici urge the court to recognize that the sanctioning of non-WIN "work rules" would authorize more than an exclusion from AFDC for those unwilling to accept non-WIN work assignments. It would also condone the imposition of a variety of related requirements (such as the check pick-up) which the Congress has not determined to be necessary to accomplish its goal of maximizing employment for AFDC recipients, and which run contrary to the fundamental purpose of AFDC itself, the relief of financial need. The description of the check pick-up operation in New York is only illustrative of how state non-WIN work requirements might be implemented.[28]

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[27] The addition of 18 NYCRR §385.5, providing that in certain "hardship" cases reporting to SES will not be required, does not ameliorate the problem since costs are not provided for those who do not meet the physical hardship tests (which are themselves quite subjective).

[28] Another example would be the requirement imposed by New York that an AFDC mother make "diligent" efforts to find day care, N.Y. Soc. Serv. L. §131.4, interpreted by the welfare department to require evidence of a denial of child care by *five* separate providers, such searches being conducted at the *mother's* expense, and while she has her small children to care for.

In sum, then, the New York work rules run completely contrary to the thrust of the 1967 and 1971 WIN amendments—the establishment of nationally uniform, carefully delineated protections and procedures which were to be utilized prior to mandating the acceptance of work by AFDC recipients. The departure from its 1935 purpose to permit AFDC mothers to remain at home full-time to care for their children was to be countenanced only within the parameters of the WIN program in which the twin goals of maximum self-support and continuing parental protection could *both* be achieved. Appellants, rather than offer the Court any countervailing congressional purpose as evidenced in committee reports, debates, or statutory language, merely tout the wisdom and allegedly beneficent purposes of the New York eligibility rules, and complain that they have been thwarted in their objectives by the failures of the WIN program. Appellants conclude, relying on "the inadequacy [as they view the situation] of the WIN program as a comprehensive program of job placement of welfare recipients," that "the Federal program was not intended to be preemptive" (Br. 38).

As a matter of statutory construction, it is difficult to understand how purported inadequacies in the WIN program revealed *subsequent* to its enactment are demonstrative of *prior* congressional intent. First, appellants' assertion ignores the 30 plus years of congressional intent to prohibit compulsory work referrals (except in AFDC-U and §409) prior to the enactment of WIN, as it must, since the "inadequacy" of WIN is relevant only if we assume Congress has *always* authorized state work rules and that WIN was merely an add-on. As extensively discussed above, this is not the case. Second, when Congress sent

H.R. 12080 to the President in 1967, it believed WIN would be quite adequate to the job.

Thus, while it is true that the Secretary of Labor was directed to establish a WIN program only in those areas "in which he determines there is a significant number" of recipients over age 16, 42 U.S.C. §632, a fact of which both the State and County appellants vigorously complain, the Secretary was also directed to "use his best efforts to provide such programs either within [non-WIN areas] . . . or through the provision of transportation . . . to [WIN areas] . . ." *Ibid.* As a consequence the Finance Committee "anticipated that virtually all individuals who are referred to the Secretary of Labor by the welfare agencies will participate in the program." S. Rep. No. 744, *supra*, at 148. Congress, then, expected full participation in WIN. It is worth noting that WIN operates in areas of New York which comprise 93% of the AFDC cases in the state.[39] In any case, having determined that the experience with AFDC-U and §409 counseled heavily in favor of a federal manpower services program run by the Department of Labor, it was not unreasonable to restrict WIN to areas in which the provision of such services was feasible, and to prohibit work requirements in other areas where they were not available.

Secondly, New York is not alone in the view that WIN as enacted in 1968 had some shortcomings. Congress' re-

[39] WIN operates in the five counties of New York City, and in the counties of Erie, Monroe, Nassau, Niagara, Oneida, Onondaga, Suffolk, Westchester, Albany, Rensselaer, and Schenectady. The recipient population of these counties and of the State was obtained by using figures supplied by New York for October 1972 in NYSDSS, *Social Statistics*, vol. XXXIV, No. 10, Table 6, February 1973.

structuring of the program in 1971 (Talmadge) was an indication, however, that it had not abandoned WIN as *the* vehicle for compulsory work requirements. Instead, Congress increased federal matching for supportive social services, 42 U.S.C. §603(d)(1), as amended by Pub. L. 92-223, §3(a)(9), mandated that at least 33⅓% of total expenditures under WIN go for on-the-job training and public service employment, 42 U.S.C. §631(b), as amended by Pub. L. 92-223, §3(b)(2), and directed a closer coordination of training with the job market, 42 U.S.C. §633(b)(2), as amended by Pub. L. 92-223, §3(b)(4)(B), all of which measures emphasize direct job placement as rapidly as possible. By so doing, Congress has greatly expanded the capacity of the WIN program to service potentially employable AFDC recipients, but it has *not* chosen to authorize state welfare agencies to impose their own programs on AFDC recipients if they are unhappy with WIN.

Thus, the President's proposed FY 1974 budget reveals that the number of recipients expected to be placed in jobs by WIN in 1973 is 150,000, and in 1974 is 165,000, compared to 42,100 actual placements in 1972. The Budget of the United States Government, Fiscal Year 1974, Appendix p. 444.[30] The President's budget anticipates that half of these job placements will be made *directly*, without training, thus revealing the expanded capacity of WIN. *Ibid.* This expansion of WIN is reflected in New York's WIN contract, entered into between the U.S. Department of Labor Manpower Administration and the New York State Department

[30] This increase is all the more noteworthy because of the fact hat the President's veto and Congress' failure to reenact an appro-riation for the Department of Labor in 1973 has required WIN o be operated pursuant to a continuing resolution, resulting in a educed budget request for 1973-74. *Id.* at 1078.

of Labor, Division of Employment, No. 2602-36, modification number 3, November 1972. Thus, whereas New York contracted to serve 28,909 participants in FY 1972 (pre-Talmadge),[31] its current FY 1973 contract calls for an estimated 90,525 participants. *Id.* at 4 (New York has registered only one-half to two-thirds of that number as of January 31, 1973). As far as funding, New York has contracted for over $32 million in federal funds for FY 1973 and, despite the continuing resolution, almost half has been obligated by January 31, 1973. *Ibid.*

Finally, although we doubt the relevancy of their argument, a closer look at New York's statistical comparison of the work rules and WIN is enlightening. Thus, at page 17 of their brief, the state appellants claim 125,000 "referrals" under the state work program, comparing that to 9,600 "opportunities for enrollment" in WIN in fiscal 1971. First, the state "referrals" figure includes Home Relief recipients,[32] mostly single men under age 64, which probably accounts for more than 60% of the total "referrals." HEW, DOL, NYSDSS, NYSDOL, *Study of Public Assistance Employables,* March 1972, p. 17. Second, "referrals" *do not mean jobs,* as the state admits at page 14—it means check pick-up. Third, the WIN "enrollment" figure (assuming its accuracy) is two years old, and pre-Talmadge, see *supra,* at 56-57, and even so, represented *actual* job or training slots, not merely a "referral" to SES.

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[31] FY 1972 figures appear at Contract No. 2602-36, "Proposal/Application for a WIN Program" (effective January 1, 1972), page I-1).

[32] Home relief is New York's general assistance program funded entirely with state and local funds, and is available to needy persons who do not meet the eligibility requirements for one of the federal categorical programs.

And what of the job placements claimed (at page 18) from January to June 1972 (5,323 statewide)? These too include Home Relief recipients, clearly more employable than WIN registrants who must satisfy their family responsibilities before being placed in a job. Furthermore, perhaps the most glaring omission in New York's analysis is its failure to discuss the significant inability of recipients placed under §131.4 to *retain* their jobs. Thus, the federal/state study revealed that of those AFDC recipients placed in jobs in September 1971, only slightly more than one-third were still employed in November, more than half were unemployed within five weeks of placement, and 27% were out of work within one week! HEW, DOL, NYSDSS, NYSDOL, *Study of Public Assistance Employables*, March 1972, p. 40. The major reasons for layoffs (representing approximately two-thirds of those unemployed in November, *id.* at 42), were lack of continued availability of work, lack of skill, illness and absenteeism. *Id.* at 39.

Such figures speak eloquently in favor of the approach taken by Congress in WIN. Referrals to jobs must follow the provision of necessary supportive services to enable such referrals to be anything more than a charade and a harassment. If New York is proud that it can get recipients to work more quickly than the Department of Labor's WIN program, perhaps it should consider why that is true (if in fact, it is). We submit that New York is able to make its claim simply because it has chosen to refer AFDC mothers to jobs for which they are untrained, and which they are unprepared to take because of their need for supportive services which are not provided by the state. The Court should not interpret congressional intent to favor such a program in the face of the considerable care Congress has taken to avoid that very result.

Conclusion

The judgment below, insofar as it enjoins the appellants from denying AFDC to individuals who fail to comply with the New York work rules, should be affirmed.

Respectfully submitted,

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